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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

MARGARITO T. LOPEZ individually
and as successor in interest to Margarito
E. Lopez, Deceased; SONIA TORRES,
KENI LOPEZ, and ROSY LOPEZ,
individually,

Plaintiffs,

vs.

CITY OF LOS ANGELES; JOSE
ZAVALA; JULIO QUINTANILLA; and
DOES 1-10, inclusive,

Defendants

Case No. 2:22-cv-07534-FLA-MAAx

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION IN LIMINE NO. 3 TO
EXCLUDE EVIDENCE OF
PERSONNEL RECORDS OF
PLAINTIFFS' EXPERT SCOTT
DEFOE, OBTAINED FROM THE
RIVERSIDE COUNTY SHERIFFS'
DEPARTMENT**

*[[Proposed] Order and Declaration of
Shannon J. Leap filed concurrently
herewith]*

Trial Date: July 16, 2024

Final Pretrial Conference: May 31, 2024

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1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD AND**
2 **TO THIS HONORABLE COURT, PLEASE TAKE NOTICE** that Plaintiffs
3 will and do hereby move to exclude any evidence, testimony, argument, or
4 reference at trial to information obtained from Defendants' untimely and
5 defectively served subpoena on Riverside County Sheriffs' Department for the
6 personnel records of Plaintiffs' retained expert, Scott A. DeFoe.

7 This Motion is based on this Notice of Motion, the Memorandum of Points
8 and Authorities, the records and files of this Court, and upon such other oral and
9 documentary evidence as may be presented at the time of the hearing. A proposed
10 order is submitted herewith.

11 Statement of Local Rule 7-3 Compliance: This motion is made following a
12 conference of counsel during which no resolution could be reached.

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15 Respectfully submitted,

16 DATED: May 3, 2024

LAW OFFICES OF DALE K. GALIPO
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19 By /s/ Shannon J. Leap

Dale K. Galipo

Renee V. Masongsong / Shannon J. Leap

20 Michael S. Carrillo / J. Miguel Flores

21 *Attorneys for Plaintiffs*
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case involves the officer-involved shooting death of Margarito E. Lopez (Mr. Lopez) by Los Angeles Police Department Officers, Defendants Jose Zavala and Julio Quintanilla (“defendant officers” collectively). The primary issue in this case is whether the defendant officers used excessive force when they shot Mr. Lopez.

It is anticipated that Defendants will attempt to use information obtained from a subpoena that Defendants Jose Zavala and Julio Quintanilla obtained through a subpoena served on the Riverside County Sheriffs’ Department as impeachment evidence against Plaintiffs’ retained expert, Scott A. DeFoe. There are several fundamental issues with admission of such evidence, stemming from the procedurally defective subpoena, all raised in Plaintiffs’ *ex parte* application, dated April 12, 2024. (Dkt. No. 50). To admit such evidence, even as impeachment evidence only, would be unduly prejudicial to plaintiffs under Rule 403 for the following reasons:

1. Defendants Jose Zavala and Julio Quintanilla issued a subpoena to the Riverside County Sheriffs’ Department on or about March 20, 2024, purportedly requesting the employment and personnel records of Plaintiffs’ retained expert, Scott A. Defoe. (See Dkt. No. 50-1, Declaration of Shannon J. Leap (“Leap Decl.”) at ¶ 2).
2. Defendants did not provide notice of or serve the subpoena on Plaintiffs or their counsel, in violation of Federal Rules of Civil Procedure, Rule 45. (See Dkt. No. 50-1, Leap Decl. at ¶ 3; Dkt No. 50-6, Declaration of Michael S. Carrillo (“Carrillo Decl.”) at ¶ 2-3).

- 1 3. The purported date of compliance for the subpoena was April 8, 2024. (See
2 See Dkt. No. 50-1, Leap Decl. at ¶ 2).
- 3 4. Fact discovery closed on February 20, 2024. Dkt. No. 44.
- 4 5. Initial Expert Disclosures were exchanged on February 16, 2024. Expert
5 Discovery closed on March 29, 2024. Dkt. No. 44.
- 6 6. The documents Defendants request by way of their subpoena are privileged
7 and outside the scope of Federal Rules of Civil Procedure, Rule 26.
- 8 7. On April 2, 2024, Plaintiffs' Counsel, Shannon J. Leap, received a phone
9 call from attorney Steven Sherman, notifying her that he represented the
10 Riverside County Sheriffs' Department, and that he had received this
11 subpoena from Defendants Julio Quintanilla and Jose Zavala on March 20,
12 2024 with a date of compliance of April 8, 2024. Ms. Leap notified Mr.
13 Sherman that Plaintiffs were never served with, nor notified of that subpoena
14 and notified Mr. Sherman of the discovery cutoff deadlines in effect in this
15 case and that Plaintiffs would be objecting to the release of Mr. DeFoe's
16 records. (See Dkt. No. 50-1, Leap Decl. at ¶ 2-4).
- 17 8. On April 3, 2024, Plaintiffs served on all parties, including Mr. Sherman as
18 the attorney for the third party, Riverside County Sheriffs' Department,
19 Plaintiffs' Notice of Objections to Defendant's Subpoena. (See Dkt. No. 50-
20 1, Leap Decl. at ¶ 4; See Dkt. No. 50-2, Ex.1 attached to Leap Decl.).
21 Plaintiffs' counsel also sent a letter to Mr. Sherman requesting that his client
22 not produce the records for the reasons stated in the Notice of Objections.
23 (See Dkt. No. 50-1, Leap Decl. at ¶ 4; See Dkt. No. 50-3, "Ex. 2" to Leap
24 Decl.), and a meet and confer letter to counsel for Julio Zavala and Jose
25 Quintanilla requesting they withdraw their subpoena. (See Dkt. No. 50-1,
26 Leap Decl. at ¶ 4; See Dkt. No. 50-4, "Ex. 3" to Leap Decl.).
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1 9. On April 5, 2024, Ms. Leap and defense counsel Sherry Lawrence received
2 an email from Mr. Sherman notifying them that his client would not be
3 producing the records for the reasons stated in Plaintiffs' Notice of
4 Objections. (See Dkt. No. 50-5, "Ex. 4" to Leap Decl.).

5 10. On April 5, 2024, defense counsel Muna Busailah sent an email notifying
6 Plaintiffs' counsel that Defendants Julio Quintanilla and Jose Zavala would
7 not be withdrawing their subpoena, although she provided no basis or
8 authority for that position. (See Dkt. No. 50-1, Leap Decl. at ¶ 6).

9 11. On April 9, 2024, Ms. Leap received a phone call from Mr. Sherman
10 advising her that Ms. Lawrence insisted that the Riverside County Sheriffs'
11 Department produce the employment records. (See Dkt. No. 50-1, Leap
12 Decl. at ¶ 7).

13 12. On April 12, 2024, Plaintiffs filed an *ex parte* application requesting this
14 Court quash the subpoena on the aforementioned bases. (See Dkt. No. 50).

15 13. On April 15, 2024, Honorable Magistrate Judge Maria A. Audero issued an
16 order denying Plaintiff's Ex Parte on the basis that it was untimely, but did
17 not offer any opinion regarding the merits of Plaintiffs' *ex parte* or motion.
18 (Dkt. No. 52).

19 14. Plaintiffs' *ex parte* application was necessarily untimely because
20 Defendants did not notice Plaintiffs of the subpoena and the subpoena itself
21 was untimely and Plaintiffs did not learn about the subpoena until *after* the
22 fact and expert discovery cutoffs had passed. Plaintiffs were necessarily
23 prejudiced because the appropriate window for filing a motion to quash
24 passed long before Plaintiffs' counsel was ever notified of the subpoena.

25 15. Defendants have still not cured the defects in this subpoena, which *still* has
26 not been served on Plaintiffs. Defendants have made no argument or
27 indication that their failure to comply with the requirements of Rule 45 was
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1 inadvertent or a mistake. Defendants should not now be rewarded for
 2 improper discovery tactics.

3 **II. ARGUMENT**

4 **A. Documents Produced in Response to Defendants' Third Party Subpoena 5 Should be Excluded Because it Violated the Discovery Process.**

6 This Court may limit admission of evidence that is barred by discovery rules.
 7 Fed. R. Civ. Pro. 37(b)(2)(A). The Court may act under its "inherent power to
 8 manage the course of trials." *Luce v. United States* 469, U.S. 38, 41 (1984). The
 9 Ninth Circuit "has recognized as part of a district court's inherent powers the 'broad
 10 discretion to make discovery and evidentiary rulings conducive to the conduct of a
 11 fair and orderly trial. Within this discretion lies the power ... to exclude testimony
 12 of witnesses whose use at trial ... would unfairly prejudice an opposing party.'
 13 *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363 (9th Cir.
 14 1992), citing *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir.1980)
 15 (citations omitted). Defendants failed to comply with the rules of discovery in
 16 obtaining the personnel records for Plaintiffs' expert Scott A. DeFoe, and this Court
 17 can exclude the evidence on those grounds alone. Fed. R. Civ. Pro. 37(b)(2)(A).

18 As outlined in Plaintiffs' *ex parte* application on this issue, Federal Rule of
 19 Civil Procedure, Rule 45 (a)(1)(D)(4) specifically provides that a notice and copy
 20 of a subpoena commanding "the production of documents, electronically stored
 21 information, or tangible things" [be served on each party] "before it is served on
 22 the person to whom it is directed." Fed. R. Civ. Pro., Rule 45 (a)(1)(D)(4). This
 23 notice requirement gives Plaintiffs standing to object to the subpoena, as does the
 24 fact that the subpoena is regarding Plaintiffs' retained expert's privileged
 25 employment history. *Littlefield v. NutriBullet, L.L.C.*, No. CV 16-6894 MWF
 26 (SSX), 2018 WL 5264148 at *4 (C.D. Cal. Jan. 22, 2018). The Rule is
 27 unambiguous: parties must be notified. No member of Plaintiffs' counsel were
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1 served either a notice or copy of the subpoena prior to the service of the subpoena
2 on the third party. (Dkt. No. 50-1 at ¶ 3). To date, Plaintiffs still have not been
3 served notice or a copy of the subpoena, despite notifying the serving party of this
4 deficiency. *Id.* at ¶ 3, 8. Therefore the defect has not been cured.

5 In addition, Defendants Julio Quintanilla and Jose Zavala served their
6 subpoena on third party Riverside County Sheriffs' Department nine days before
7 the expert discovery cutoff and for a compliance date of April 8, 2024 – after the
8 expert discovery cutoff deadline. (Dkt. No. 50-1, at ¶ 2; Dkt. No. 44). This Court's
9 scheduling order provides that “[t]he cut-off date for discovery is not the date by
10 which discovery requests must be served; it is the date by which all discovery,
11 including all hearings on any related motions, must be completed. Thus, written
12 discovery must be served... sufficiently in advance of the discovery cut-off date to
13 permit the propounding party enough time to challenge the responses deemed to be
14 deficient via motion practice. Given the requirements to meet and confer and to
15 give notice, a planned motion to compel must ordinarily be discussed with the
16 opposing party at least six (6) weeks before the cut-off.” (Dkt. No. 27 at 4:6-11,
17 emphasis included in original).

18 Although Plaintiffs were able to serve their objections to the subpoena prior to
19 the compliance date, they were unable to serve their objections prior to the fact or
20 expert discovery cutoff deadline. Plaintiffs were therefore also unable to file a
21 motion to quash in accordance with this Court's scheduling order, given that
22 Plaintiffs only learned about the subpoena *after* the close of expert discovery. Any
23 motion that Plaintiffs' filed would be untimely, precisely because Defendants failed
24 to notify Plaintiffs of the subpoena, failed to serve the subpoena on all parties, and
25 failed to serve the subpoena with a compliance date within the applicable discovery
26 period, in violation of Federal Rule of Civil Procedure, Rule 45. Plaintiffs were
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1 therefore prejudiced in their ability to seek relief from this improper subpoena. For
2 these reasons, use of these records should be excluded at trial.

3 Defendants' subpoena simply does not comply with this Court's order or the
4 rules of discovery. Defendants should not be rewarded for their blatant improper
5 discovery conduct and "[c]ourts need not tolerate such flagrant abuses of the
6 discovery process." *Campbell Indus. v. M/V Gemini*, 619 F.2d 24 (9th Cir. 1980)
7 (excluding testimony that violated rules of discovery).

8 Courts in this district have confronted similar situations, finding such
9 procedurally defective subpoenas invalid. For example, Plaintiffs' subpoenas
10 served several days prior to the close of fact discovery were deemed untimely and
11 their insistence on enforcing compliance with the defective subpoena a "thinly
12 veiled attempt to get around the already-expired discovery deadline." *See Glob.*
13 *Master Int'l Grp., Inc. v. Esmond Nat., Inc.* No. 219CV10360RGKPLA, 2021 WL
14 3260606 at *4 (C.D. Cal. Apr. 30, 2021). Similarly, a subpoena served within the
15 discovery period, but with a compliance date a few days before the cut-off date
16 was deemed untimely because it did not permit the challenging party sufficient
17 time to challenge by motion responses deemed to be deficient. *MAP Co. v.*
18 *Lebanese Arak Corp.*, No. CV1605039ABRAOX, 2017 WL 10434017 at * 5 (C.D.
19 Cal. Oct. 26, 2017). Similarly, courts have found that such compounded procedural
20 defects in a subpoena can cause undue burden on the parties, and sufficient
21 grounds to invalidate the subpoena. *See Thompson v. Cnty. of Riverside*, No. 5:19-
22 CV-00122-AB-SHK, 2023 WL 8168859 (C.D. Cal. July 26, 2023), reconsideration
23 denied, No. 5:19-CV-00122-AB-SHK, 2023 WL 6194322 (C.D. Cal. Aug. 7,
24 2023). In *Thompson*, the court granted defendants' motion to quash plaintiff's
25 subpoenas for deposition on the basis that the subpoenas were improperly noticed
26 and served in violation of multiple rules and that they placed an undue burden on
27 the defendants and deponents. *Id.* at 8-9. The same is true in this case.

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Defendants violated the rules of discovery in attempting to or actually obtaining the records they seek to use as possible impeachment evidence against expert Scott DeFoe. This Court should exercise its inherent powers to exclude the use of such evidence.

B. The Evidence is Unduly Prejudicial Under Rule 403.

Additionally, to admit evidence obtained in violation of the Federal Rules of Procedure and the federal rules of discovery would be unduly prejudicial to Plaintiffs, under Rule 403. Plaintiffs have still not even been provided a copy of the subpoena and are unaware if the records have actually been produced to Defendants. Argument, questioning, and testimony related to Plaintiffs' expert Scott A. DeFoe's personnel record from his employment as a Deputy Sheriff at the Riverside County Sheriff's Department should be excluded as unduly prejudicial under Rule 403. Plaintiffs have not received the records, and surprise on the eve of trial is unfairly prejudicial.

III. CONCLUSION

For the reasons above, this Court should grant Plaintiffs' Motion *in Limine* No. 3 and exclude any questioning, testimony, or argument regarding the personnel from the records of Plaintiffs' expert, Scott DeFoe from his employment at the Riverside County Sheriffs' Department.

Respectfully submitted,

DATED: May 3, 2024

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